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SUPREME COURT U.S.

NO. 82 6840

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

MICHAEL P. JAMES — PETITIONER

VS.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

COMMONWEALTH OF KENTUCKY — RESPONDENT

* * * * *

C. THOMAS HECTUS
GITTLEMAN & BARBER
635 West Main Street
Louisville, Kentucky 40202
(502) 585-2100

C. Thomas Hectus
COUNSEL FOR PETITIONER

May 27, 1983

QUESTION PRESENTED FOR REVIEW

IS IT A DENIAL OF A CRIMINAL DEFENDANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS AGAINST COMPULSORY SELF-INCRIMINATION AND TO DUE PROCESS OF LAW WHERE A STATE TRIAL COURT DENIES A TIMELY REQUEST FOR AN "ADMONITION" DIRECTING THE JURY THAT NO ADVERSE INFERENCE MAY BE DRAWN FROM THE DEFENDANT'S FAILURE TO TESTIFY, WHERE AN "ADMONITION" IS THE FUNCTIONAL EQUIVALENT OF THE "INSTRUCTION" MANDATED BY THIS COURT IN CARTER VS. KENTUCKY?

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Petitioner, Michael P. James, respectfull prays that a Writ of Certiorari issue to review the opinion of the Supreme Court of Kentucky entered on March 30, 1983.

OPINION BELOW

The opinion of the Supreme Court of Kentucky was rendered on March 30, 1983, and is not to be published. [Appendix, hereinafter A., pp. 1-5].

JURISDICTION

The opinion of the Supreme Court of Kentucky was entered on March 30, 1983. No rehearing was sought. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which states in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

The Fourteenth Amendment to the United States Constitution, which states in pertinent part:

> . . . nor shall any State deprive any person of liberty . . . without due process of law. . . .

STATEMENT OF THE CASE

Michael P. James, (hereinafter, petitioner) was indicted by the September, 1981 term of the Franklin County (Kentucky) Grand Jury, and charged with the offenses of burglary in the second degree; rape in the first degree; and, receiving stolen property over $100.00. [Transcript of Record, hereinafter T.R., p. 1]. Further, petitioner was charged with being a persistent felony offender in the first degree. [T.R., p. 2].

At a suppression hearing held on on August 31, 1981, Detective Claude Owen of the Kentucky State Police testified that he received a call from the Frankfort State Police Post, reporting that there had been a rape, and that he should meet the victim at King's Daughters Hospital in Frankfort. [Transcript of Evidence, hereinafter T.E., Vol. I, p. 7]. At the hospital, he

interviewed Donna Richardson, who reported that she "had been raped by a black male, extremely tall, and that he was her next door neighbor and his first name was Mike." [Id]. After ascertaining petitioner's last name,[1/] Detective Owen then obtained an arrest warrant for petitioner. Detective Owen testified that he and other officers went into petitioner's residence on East Main Street in Frankfort, where petitioner's wife told them that he was at Kentucky State University coaching a basketball game. [T.E. Vol. I, p. 8]. The officers later located petitioner at Kentucky State, where he was placed under arrest. [Id]. At that time, Detective Owen seized a blue gym bag from petitioner. [T.E. Vol. I, p. 9]. The officers returned to the police station with petitioner, during which time petitioner was asked if the police could search his apartment; the police were advised that they could not. [T.E. Vol. I, p. 10]. Owen testified, however, that petitioner's wife was at the police station, and that she consented to the search of the apartment. [Id]. Owen also testified that a search warrant was obtained from Judge Crittenden while they were at the police station. [Id].

Det. Robert Courtney of the Frankfort police testified that while they were at petitioner's house executing the search warrant, Courtney went outside to the police cruiser to get some evidence bags. [T.E., p. 33]. At this time, Courtney said he slid his hand under the gym bag, and felt what appeared to be a gun. [T.E. Vol. I, p. 33]. He then opened the bag and discovered the gun. [Id]. He took the bag inside and showed the weapon to Detectives Boetcher and Owen. [Id].

After taking the suppression issues under submission, the motion was overruled. [T.R., p. 55].

Trial commenced on January 18, 1982. The first witness for the Commonwealth was Donna K. Richardson. [T.E. Vol. II, p. 62]. Ms. Richardson testified that on April 23, 1980, she

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1/ Apparently there had been a fire at petitioner's address at some point previous to this incident; a Detective Boetcher found petitioner's last name from records in the fire department. [T.E., Vol. I, p. 7].

returned to her home, when she noticed that the light was out on the front porch. [T.E. Vol. II, p. 63]. The light had been unscrewed from the socket, so that when it was screwed back in, the light came back on. [Id]. Also, her door was ajar. [Id]. After entering the house, she found that her pistol had been stolen from under her pillow. [Id]. She then identified Commonwealth's Exhibit No.1 (a pistol and a box) as the pistol and box which had been stolen from her home during the burglary. [Id].

Ms. Richardson related that subsequently, on May 1, 1981, she found the glass out of her screen door in the kitchen, and found that the locks were undone. [T.E. Vol. II, p. 64]. Nothing was missing, although the pillows on her bed had been messed up. [Id].

Ms. Richardson said that on May 6, 1981, she went home from work for lunch. [T.E., p. 65]. While she was at home, petitioner came to her apartment and asked to use the phone to call a doctor, saying his wife was sick. [Id]. As she started to dial a number of her own doctor, petitioner grabbed her mouth with his hand, and told her to hang up the phone. [T.E., p. 66]. She stated that petitioner told her to do what he said, or he would kill her. [Id]. She said that petitioner attempted to shove the front door closed and the gun went off into the floor. [T.E., pp. 66-67]. According to Ms. Richardson, petitioner took her to the bedroom, where he tied her hands behind her back and gagged her mouth. [T.E. Vol. II, p.. 67]. Ms. Richardson stated that petitioner then told her they were going to go to his house; he allegedly told her not to try anything or he would kill her. [T.E. Vol. II, p. 68].

Ms. Richardson stated that after getting to petitioner's house, he told her to take her clothes off. [T.E. Vol. II, p. 69]. Petitioner allegedly got a towel, layed it across the bed, and then engaged in sexual intercourse with her. [Id]. According to Ms. Richardson, petitioner then allowed her to wash up, and then allowed her to leave after she promised that she would not tell anyone. [T.E. Vol. II, p. 70]. Also, before

leaving, she was able to secure from petitioner the return of her purse, which contained a second gun. [Id].

After she was released, Ms. Richardson returned to work. [T.E. Vol. II, p. 72]. Because she was frightened, she did not call the police until later that evening. [T.E. Vol. II, p. 72]. After the police were called, Ms. Richardson went to King's Daughters Memorial Hospital in Frankfort. [Id]. Ms. Richardson identified two cloth strips which had been seized from the gym bag appeared to be the strips that were used to tie and gag her. [T.E. Vo. II, p. 73].

The next witness for the Commonwealth was Scott Clark. [T.E. Vol. III, p. 4]. Mr. Clark is an officer with the Frankfort Police Department who investigated the break-in at Donna Richardson's home on May 1, 1981. [T.E. Vol. III, pp. 5-6]. Officer Clark stated that he found the windowpane from the rear storm door beneath the porch in some bushes. [T.E. Vol. III, p. 6]. He dusted the windowpane for fingerprints, and found one latent print on the inside glass. [Id]. He attached the latent to an offense report, and gave it to Detective Courtney. [Id].

The next witness was Trooper John M. Sparks of the Kentucky State Police. [T.E. Vol. III, p. 10]. Trooper Sparks stated that on May 6, 1981 he interviewed Donna Richardson at her home regarding the alleged rape, and then transported her to King's Daughters Hospital in Frankfort. [T.E. Vol. III, p. 11]. He received the victim's blood sample from a nurse on duty. [T.E. Vol. III, p. 11]. After this, he, Detective Owen, and Detective Courtney went to petitioner's home, and then proceeded to Kentucky State University, where petitioner was arrested. [T.E. Vol. III, pp. 12-13]. Trooper Sparks then identified the gym bag which was taken from petitioner on the evening of his arrest. [T.E. Vol. III, p. 14]. Sparks stated that he returned to his police cruiser from petitioner's home to get some evidence bags, when he felt an object in a gym bag that appeared to be a gun. [T.E. Vol. III, p. 16]. He then took the bag inside the home, and found a gun in the bottom of the bag. [Id]. Sparks then identified the gun previously identified by Ms. Richardson

as the gun stolen from her apartment. Sparks also stated that strips of cloth found in the bag were similar to those described by Ms. Richardson as those with which she had been bound and gagged with. [T.E. Vol. III, p. 18].

Trooper Sparks also testified that, in processing the victim's apartment, he discovered a smashed bullett laying on the floor near the doorway. [T.E. Vol. III, p. 19]. The bullett appeared to have ricocheted off an interior wall behind the door. [Id].

The next witness at trial was Detective Claude Owen of the Kentucky State Police. [T.E. Vol. III, p. 38]. Detective Owen's testimony was substantially the same as that related at the suppression hearing, supra. Additionally, Detective Owen testified that he provided the hospital with a "rape kit" which was administered to Ms. Richardson. [T.E. Vol. III, p. 49].

The next witness for the Commonwealth was Detective Robert Courtney of the Frankfort City Police Department. [T.E. Vol. III, p. 51]. Courtney's testimony is essentially the same as that given at the suppression hearing, supra.[2/]

The next witness for the Commonwealth was Mr. James E. Evans, who was employed by the Kentucky State Police Identification Unit. [T.E. Vol. III, p. 70]. Mr. Evans stated that he received a copy of the latent print taken from the storm door of the residence of Donna Richardson, and also a copy of the inked fingerprints of petitioner after he was arrested. [T.E. Vol. III, p. 73]. After comparing the prints, it was his opinion that the latent fingerprint was the same as the impression on the inked prints of petitioner's left ring finger. [T.E. Vol. III, pp. 73-74]. On cross-examination, Evan's acknowledged that there is no way to determine how old a latent print might be. [T.E. [Id].

2/ At the suppression hearing, Courtney had testified that he had felt the pistol in the gym bag while looking for evidence bags. In an apparent contradiction, Sparks testified at trial that it was himself who had inadvertently discovered what he felt was a pistol in the gym bag. At trial, Courtney testified that "Trooper Sparks went into his vehicle and ran his hand underneath the gym bag and immediately said, 'Look here.' I ran my hand under the bag, and you could tell that there was a weapon in the bag, a pistol." [T.E. Vol. III, p. 55].

Vol. III, p. 82]. Prints on the inside of buildings (i.e., not exposed to atmospheric conditions) can last several years.

The next witness was Mr. Edward Taylor, a forensic serologist with the State Crime Laboratory in Frankfort. [T.E. Vol. IV, p 4]. Taylor testified that he examined Ms. Richardson's blood sample and found her to be a group A secretor. [T.E. Vol. IV, p. 8]. Taylor also determined that the two strips of cloth submitted by Detective Owen were found to contain saliva and group A factors. [Id].

On cross-examination, Taylor stated that while the white towel that was recovered from Mr. James' home contained samples of hair, the hair was dissimilar from the victim. [T.E. Vol. IV, p. 12]. In fact, the hair samples which were found on the white towel were similar to the caucasian head hair and pubic hair of Mrs. James, petitioner's wife. [Id]. The towel also contained acid phosphatase, which is a constituent of semen. [T.E. Vol. IV, p. 13].

Mr. Taylor testified on recross examination that the semen present on the vaginal swabs, vaginal smear, tampon, and panties which were submitted from the victim were too limited in quantity to determine blood type. [T.E., Vol. IV, p. 15].

The final witness for the Commonwealth was Mr. David Adams. [T.E. Vol. IV, p. 16]. Mr. Adams is an employee of the office in which Ms. Richardson was employed. [T.E. Vol. IV, pp. 16-17]. Adams stated that on May 6, 1981, Ms. Richardson returned from lunch sometime between 4:30 and 5:00 p.m. [T.E. Vol. IV, p. 17]. Ms. Richardson came into his office crying, rather nervous and upset. [T.E. Vol. IV, p. 18]. At that time, Ms. Richardson told him that she had been raped. [Id]. He testified that Ms. Richardson told him that she did not report the incident because "That's the only way I could get away, that he'd let me go if I didn't tell anyone. Otherwise, he'd kill me." [Id].

At the close of the Commonwealth's case, petitioner moved for a directed verdict, which was overruled. [T.E. Vol. IV, p. 26].

The first witness for petitioner was Mr. Marion Bates. [T.E. Vol. IV, p. 31]. Mr. Bates testified that he lived at 266 E. Main Street in Frankfort. [Id]. He testified that on May 6, 1981, he was in his yard working on his car. [T.E. Vol. IV, pp. 31-32]. Around noon time, Chuck Lambert approached him and asked him to come and see his basement, which he had renovated. [T.E. Vol. IV, p. 33]. The basement was in the house in which petitioner lived. [Id]. Bates testified that he was in the basement at approximately 12:40 p.m., at which time Mr. Lambert had to return to work. [T.E. Vol. IV, p. 35]. Bates then returned to the driveway to work on his car. [Id]. In the meantime, Bates testified that petitioner had come out of the house, locked the door, and went up the street. [Id]. When Bates was in the house, he heard nothing upstairs but the record player. [Id]. During the time that Bates was out front working on his car, he did not see anyone go in or out of petitioner's apartment. [T.E. Vol. IV, p. 37].

The final witness for petitioner was Mr. Charles Lambert. [T.E. Vol. IV, p. 44]. Mr. Lambert stated that he did not recall showing his property to Mr. Bates on the particular date of May 6, 1981, but that it was not unusual for him to show Mr. Bates his property. [T.E. Vol. IV, p. 46].

Petitioner did not testify. However, at the close of all the evidence, petitioner requested that an admonition be given to the jury with regard to his failure to testify. The motion was overruled. [T.E. (Red Volume) p. 4].

After deliberating, the jury convicted petitioner of second degree burglary, and fixed his sentence at ten (10) years imprisonment. [T.R., p 37]. Also, petitioner was convicted of rape, and sentenced to twenty (20) years imprisonment. [Id]. Finally, the jury convicted petitioner of receiving stolen property, and fixed his punishment at twelve (12) months incarceration. [T.R. p. 38].

After petitioner's conviction on the principal offenses, the trial continued with the persistent felony offender proceedings. At the close of all the evidence in the PFO

proceeding, petitioner moved for a directed verdict, which was overruled. [T.E. Vol. V, p. 47]. The jury convicted petitioner as a first degree persistent felony offender, and fixed his punishment at life in the penitentiary. [T.R., p. 45].

REASON FOR GRANTING THE WRIT

THE OPINION OF THE SUPREME COURT OF KENTUCKY REPRESENTS AN OBVIOUS ATTEMPT BY THAT COURT TO CIRCUMVENT THE MANDATE OF THIS COURT IN CARTER V. KENTUCKY AND DEPRIVES PETITIONER OF THE BENEFIT OF JUDICIAL GUIDANCE AS TO THE JURORS UNDERSTANDING OF THE PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION.

Petitioner, by his counsel, requested prior to the instruction of the jury that "an admonition be given to the jury that no emphasis be given to the defendant's failure to testify . . ." [T.E. (Red Volume) p. 4]. Petitioner submits that the failure to do so deprived him of due process of law.

The law in Kentucky had apparently been to the effect that no comment (even one protective in nature) could be made on a defendant's failure to testify. Green v. Commonwealth, Ky., 488 S.W.2d 339 (1972), interpreting KRS 421.225; but see Spencer v. Commonwealth, Ky., 467 S.W.2d 128 at 130-131 (1971) and Kelley v. Commonwealth, 300 Ky. 136, 187 S.W.2d 796, 800 (1945)(holding that the defendant was entitled to an instruction upon request; the language in Spencer was rejected in Green, supra, as "dicta").

However, petitioner submits that the requested "admonition" in this case is now constitutionally mandated. That petitioner's trial counsel apparently requested an "admonition" rather than an instruction is of no legal significance. Whatever form of judicial guidance is requested, the constitutional underpinnings are the same. The only significant legal concern is that the jury understand a criminal defendant's privelege against self-incrimination. An admonition, which has been defined in Kentucky as "any authoritative oral communication or statement by way of advice or caution by the court to the jury respecting their duty or conduct as jurors . . . ," Miller v. Noell, 193 Ky. 659, 237 S.W. 373, 374 (1922), is functionally equivalent to an instruction.

In Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), this Court reviewed a decision of Supreme Court of Kentucky which affirmed Carter's conviction despite the refusal of the trial court to instruct the jury on Carter's failure to testify. This Court reversed, stating that:

> The freedom of a defendant in a criminal trial to remain silent 'unless he chooses to speak in the unfettered exercise of his own free will' is guaranteed by the Fifth Amendment and made applicable to state criminal proceedings through the Fourteenth. [cite omitted]. And the Constitution further guarantees that no adverse inferences are to be drawn from the exercise of that privilege. [cite ommitted]. Just as adverse comment on a defendant's silence "cuts down on the privilege by making its assertion costly," [cite omitted], the failure to limit the jurors' speculation on the meaning of that silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege. Accordingly, we hold that a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify.
>
> [Id, 101 S.Ct. at 1121-1122].

It cannot be assumed that the jury in petitioner's case did not notice petitioner's failure to testify, and therefore drew no adverse inference therefrom. This Court has labeled such an assumption as "very doubtful . . . speculative . . . [and] dubious . . .." Lakeside v. Oregon, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978).

It is obvious that this Court's decision in Carter v. Kentucky did not turn on the form of the guidance which this court directed file judges to give juries with regard to the privilege against self-incrimination. In Bruno v. United States, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed. 257 (1939), this Court, in interpreting a federal statute, stated that:

> the only way Congress could provide that abstention from testifying should not tell against an accused was by an implied direction to judges to exercise their judicial duty in guiding the jury by indicating the considerations relevant to

the latter's verdict on the facts. [Bruno, supra, 308 U.S. at 293].

This Court surely could not have meant in its opinion in Carter v. Kentucky that a state trial court could only exercise its judicial duty to guide a jury by way of a written instruction. The Court's implicit concern was the psychological operation of the jury's mind, and petitioner submits that a judge can indicate the considerations relevant to the jury's deliberation by oral admonition as well as by written instruction.

(1) This Case Was Not Resolved By The State Court On the Basis Of "Harmless Error."

It is important to note that the Supreme Court of Kentucky did not decide this case on the basis of harmless error. Rather, the Supreme Court of Kentucky's disposition of this issue was decided entirely on the terminology of petitioner's request:

> James requested that the trial court give an "admonition" to the jury that no emphasis be given to James' failure to testify. This request was denied by the trial court. In his argument on this appeal James attempts to equate this request for an admonition with a request for an "instruction" on failure of the defendant to testify. Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), held that a state trial judge has the constitutional obligation to give a prophylactic instruction upon proper request to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify. There is a vast difference in a request for an admonition and a requested instruction. James is entitled to the instruction, but did not ask for it. The trial court properly denied the request for an admonition. [A., p. 3].

Had the Kentucky court chosen to decide this case on "harmless error," it would have done so. Only two weeks prior to the opinion of the Kentucky Supreme Court in petitioner's case, the Court decided Commonwealth v. McIntosh, Jr., Ky., ___ S.W.2d. ___ (February 16, 1983) (30 Kentucky Law Summary 9). In McIntosh, the Kentucky Supreme Court stated that:

> . . . Carter leaves open the question of whether under certain circumstances the failure to give the requested instruction could be nonprejudicial error pursuant to the standards set in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).
>
> * * *
>
> Here proof of guilt was overwhelming. . . . Careful examination of the record does not indicate that any different result would have been achieved in this case.
>
> It is the holding of this court that the failure to give a requested instruction on the affect of the defendant's refusal to testify can be nonprejudicial error if there is overwhelming evidence of guilt and the result would not have been any different when the case is considered as a whole.

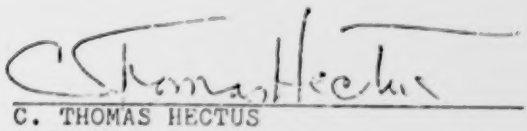
Obviously, the Kentucky Supreme Court would have applied the doctrine of harmless error, had it thought that the error in petitioner's case was harmless. Because the Kentucky court chose to decide this case on the form of petitioner's request, the merit of petitioner's request is properly before this Court.

Petitioner submits that because the trial court refused his timely request for an admonition on his right to not testify, this Court should grant this petition, reverse his conviction, and grant him a new trial.

CONCLUSION

Petitioner's case present an opportunity for this Court to reaffirm the clear mandate of Carter v. Kentucky, and further, provides an opportunity to prevent state appellate courts from distorting the clear import of the decisions of this Court. Because the decision of the Supreme Court of Kentucky in this case conflicts with the rationale of Carter v. Kentucky, a Writ of Certiorari should issue to review the opinion of the Supreme Court of Kentucky.

Respectfully submitted,



C. THOMAS HECTUS
GITTLEMAN & BARBER
635 West Main Street
Louisville, Kentucky 40202
(502) 585-2100

COUNSEL FOR PETITIONER

A P P E N D I X

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Supreme Court of Kentucky

FINAL
82-SC-394-MR
DATE APR 20 1983 Lou Combs, D.C.

MICHAEL P. JAMES — APPELLANT

V.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE HENRY MEIGS, JUDGE
#81-CR-0106

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY JUSTICE STEPHENSON

Affirming

Michael P. James was tried and convicted for the offenses of second-degree burglary, KRS 511.030, first-degree rape, KRS 510.040, and receiving stolen property, KRS 514.110. At the persistent felony offender phase of the trial, James was convicted as a first-degree persistent felony offender and the conviction for first-degree rape was enhanced to life imprisonment. James was sentenced to life imprisonment on the persistent felony offender charge and to ten years' imprisonment on the burglary charge to run concurrently. He was sentenced to twelve months in jail on the receiving stolen property charge to run consecutively with the two felonies. We affirm.

James' first assertion of error is that the trial court erroneously declined to sever the charges against him. He argues that the requirements for joinder under RCr 6.18 are not present. The three crimes here were closely related in character, circumstances, and time, and we are of the opinion there is no showing of abuse of discretion and prejudice in the joinder of the offenses

for trial. Seay v. Commonwealth, Ky., 609 SW 2d 128 (1981) and Cardine v. Commonwealth, Ky., 623 SW 2d 895 (1981). The burglary of the victim's apartment, the rape and finding property stolen from the apartment in the possession of James all occurred within a two-week period.

The evidence of the broken pane of glass and James' fingerprint in our opinion is sufficient evidence to submit the charge of burglary to the jury.

"If under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict." Trowel v. Commonwealth, Ky., 550 SW 2d 530, 533 (1977).

Mere possession of the stolen pistol is sufficient to submit the case to the jury. KRS 514.110(2). James offered no explanation for his possession of the pistol, and there is nothing in the evidence to show that it was unreasonable for the jury to find a guilty verdict.

When arrested on the rape charge, James was carrying a gym bag. The arresting officer asked James about the bag and was informed by James that someone had handed it to him and that he did not know to whom it belonged. Later, while the gym bag was in the police cruiser and officers were executing a search warrant by searching James' house, one of the officers ran his hand under the gym bag on the car seat and felt what seemed to him to be a pistol. He then proceeded to open the bag and found a pistol, which was later identified by the victim as being the pistol stolen from her apartment some days prior to the rape.

James moved to suppress the evidence of the pistol on the ground of an illegal search and seizure. He did not testify at the suppression hearing. At the hearing, the arresting officer testified that James had denied being owner of the bag and that some "dude" had handed it to him as he left the gymnasium.

The trial court denied the motion to suppress. James argues the major premise that the Commonwealth must rely on the "plain view" and "exigency" cases in this situation and that these propositions do not apply. This argument misses the real question, which is analogous to the expectation of privacy cases. We are of the opinion the search here did not violate any expectation of privacy on the part of James. He denied being owner of the bag. There is no "search" here for purposes of the Fourth Amendment, and there is a total absence of any legitimate expectation of privacy. Cf. Sussman v. Commonwealth, Ky., 610 SW 2d 608 (1981), and Rawlings v. Kentucky, 448 U.S. 98, 100A S.Ct. 2556, 65 L.Ed. 2d 633 (1980).

James requested that the trial court give an "admonition" to the jury that no emphasis be given to James' failure to testify. This request was denied by the trial court. In his argument on this appeal James attempts to equate this request for an admonition with a request for an "instruction" on failure of a defendant to testify. Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed. 2d 241 (1981), held that a state trial judge has the constitutional obligation to give a prophylactic instruction upon proper request to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify. There is a vast difference in a request for an admonition and a requested instruction. James was entitled to the instruction, but did not ask for it. The trial court properly denied the request for an admonition.

The proof of the Commonwealth on the persistent felony offender phase of the trial was that James entered a guilty plea in Nebraska to a felony charge of forgery in 1972 and was sentenced to probation for a period of two years. Later that year in Virginia, James entered a guilty plea to murder and was sentenced to twenty-eight years' imprisonment. James was on parole from this conviction when he committed the offenses here.

James argues that the Nebraska conviction does not meet the requirements of KRS 532.080(2)(a):

> "(2) ... As used in this provision, a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided:
>
> "(a) That a sentence to a term of imprisonment of one year or more or a sentence to death was imposed therefor; ... ."

The Commentary accompanying this subsection in the Kentucky Penal Code, Final Draft November 1971, p. 347, is as follows:

> "Subsection (2) sets forth a definition of a previous felony conviction. It requires in Subdivision (a) that the previous offense must have been accompanied by a sentence of imprisonment for one year. This requirement seeks to account for the possibility of conviction from a state which has a distinction between felony and misdemeanor that is different from that used in this state. Thus, although such conviction is for an offense designated in that other state as a misdemeanor, it can be treated as a felony for purposes of this statute if it carried a penalty of one year or more." (Emphasis added.)

We have consistently relied upon the Commentary as an expression of legislative intent. It is apparent that the statute does not require actual imprisonment as was the case in the former statute, and reasons for the use of the term "imprisonment" in and of itself are fully explained in the Commentary. Here the offense in Nebraska was a forgery, which is a felony in this state.

Finally James argues that the trial court erroneously ordered the misdemeanor conviction to be served consecutively with the felony convictions. James argues that our opinion in Powell v. Payton, Ky., 544 SW 2d 1 (1976), should be applied to the situation here. It is true that as a general proposition KRS 532.110(1) construed together with KRS 532.090 and KRS 532.060 mandates

that a misdemeanor sentence be served concurrently with the indeterminate sentence for a felony. That proposition would obtain here save for the application of KRS 533.060(2) which provides in part that when a defendant "is convicted or enters a plea of guilty to a felony committed while on parole, ..., the period of confinement for that felony shall not run concurrently with any other sentence."

The legislature has determined that offenses committed while on parole shall be dealt with in a harsher manner, and this clear expression of the legislature takes this case out of the rule in Powell.

The judgment is affirmed.

All concur.

ATTORNEYF FOR APPELLANT:

Jack Emory Farley
Public Advocate

John Michael Brown
Gittleman & Barber
800 Marion E. Taylor Building
Louisville, Kentucky 40202

ATTORNEYS FOR APPELLEE:

Steven L. Beshear
Attorney General

Penny R. Warren
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

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NO. 82 6840

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

MICHAEL P. JAMES — PETITIONER

VS.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMMONWEALTH OF KENTUCKY — RESPONDENT

* *

The petitioner, Michael P. James, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Kentucky without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The petitioner has been permitted by the Kentucky courts to proceed as an indigent at all stages of this action. The petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

C. Thomas Hectus

C. THOMAS HECTUS
GITTLEMAN & BARBER
635 West Main Street
Louisville, Kentucky 40202
(502) 585-2100

COUNSEL FOR PETITIONER

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VS. AFFIDAVIT OF INDIGENCY

COMMONWEALTH OF KENTUCKY — RESPONDENT

* *

Comes affiant, Michael P. James, being duly sworn and states in support of his motion to proceed in forma pauperis:

1. I am the petitioner in the above-styled case.

2. Because of my poverty I am unable to pay the costs of this proceeding.

3. I am unable to give security for the same.

4. I have no savings account. I do not own any valuable property.

6. I am presently incarcerated at the Kentucky State Penitentiary, Eddyville, Kentucky.

Further the affiant sayeth not.

_____
MICHAEL P. JAMES

Subscribed and sworn to before me by Michael P. James this ___ day of _____, 1983.

My Commission expires: _____.

_____
NOTARY PUBLIC - STATE AT LARGE